IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 121 OF 2005

Mir Attar Hussein Abdul Hussein. ... Appellant.
Versus.
Municipal Corporation of Gr.Mumbai. ... Respondents.

Shri R.A.Thorat i/by Shri G.C.Singh for the Appellant.

Shri J.Xavier for the Respondents.

CORAM : ABHAY S. OKA, J.

DATED : 7th February, 2005.

P.C.:

1. Admit. The learned Advocate for the Respondents waives service. Taken up for hearing forthwith. The challenge in this Appeal by the Plaintiff is to the Judgment and order dated 20th January 2005 whereby the Notice of Motion taken out by the Appellant/Plaintiff has been dismissed by the learned trial Judge.

2. Without going into the merits of the suit, Shri Thorat the learned Advocate appearing for the Appellant made a grievance that the reply to the Notice of Motion was filed by the Respondents on 19th January 2005 and a copy of the reply was not made available to the Advocate appearing for the Appellant and no opportunity was given to file a rejoinder. He pointed out that the Notice of Motion was heard on 19th January 2005. He has pointed out the following finding recorded by the learned trial Judge in the impugned order:

> "....Now in the affidavit in reply, the defendants have stated that the Durga Chawl Committee is far away from Oshiwara which is mentioned in the census certificate. This fact has not been challenged by the plaintiff by filing the rejoinder, so it remains on record."

The learned Counsel appearing for the Respondents has not disputed that the reply was filed on 19th January 2005. He however disputed the allegation that a copy of the reply was not served on the Advocate for the Appellant.

3. One of the grounds given by the learned trial Judge for rejecting the Notice of Motion is that the Appellant/Plaintiff has not controverted the statement made in the affidavit-in-reply. If reply was filed on 19th January 2005 and on the very date the Notice of Motion was heard, there was no opportunity for the Appellant to file a rejoinder. In this view of the matter, the impugned order deserves to be quashed and set aside and the Notice of Motion deserves to be reheard.

4. Hence I pass the following order:

(i) The impugned Judgment and Order dated

20th January 2005 is quashed and set aside and the learned trial Judge is directed to hear the Notice of Motion No.278 of 2005 afresh.

(ii) The Respondents will provide a copy of the Affidavit-in-reply filed to the said Notice of Motion to the Appellant's Advocate in the trial Court within a period of two weeks from today. The Appellant will file affidavit-in-rejoinder within a period of two weeks from the date of receipt of the reply.

(iii) The learned trial Judge will hear and decide the Notice of Motion as expeditiously as possible and preferably on or before 31st March 2005.

(iv) Till disposal of the Notice of Motion, the parties will maintain statusquo as of today in respect of the suit structure.

(v) The parties and the concerned Court to act upon the authenticated copy of this order.

Judge.